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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

LESTER ETTMAN,
Petitioner,
vs.
FEDERAL LIFE INSURANCE COMPANY,
Respondent.
No. 426.

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI.

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REPLY TO RESPONDENT'S STATEMENT.

Respondent starts its answering brief by stating that no reason is apparent why the Court should grant a writ of certiorari in this case, and the respondent tries to negative, in general terms, the contentions of petitioner.

Then respondent states that the "Statement" of petitioner is in several respects grossly unfair, untrue and misleading. This last assertion is disproved by the respondent's own quotation from the opinion of the Court of Ap-

peals (p. 2, Resp. Br.), wherein the Court of Appeals bases its opinion on the proposition that the statement in the application for insurance was untrue and material, but made without intent to deceive.

In addition, the trial court in its memorandum opinion (R. 285) expressly found that:

> "The jury was instructed upon the theory that the statements were warranties, and that if it be found that they were false it was of no moment whether plaintiff knew or did not know at the time that they were false. The verdict was for the defendant. Hence, if the Court's construction of the provisions of the policy was incorrect in this particular a new trial must follow **as there was substantial evidence that plaintiff did not know the statements were false, if in fact they were.**" (Emphasis ours.)

Respondent then states that petitioner has misrepresented the facts to this highest court because he did not set out the fact that he had poor eyesight and had visited oculists in the "Statement of Matter Involved."

Respondent also complains (p. 2, Resp. Br.) that the quotation "in defense of the instant suit, the company relied upon a theory of fraud and misrepresentation made with intent to deceive" has no page reference. It would seem that the quotation from the petition for certiorari in this court in the equity suit in 1941 should sufficiently apprise respondent of the fact therein set out (Petition, p. 4).

Respondent, complaining of the statements of petitioner, purports to quote the testimony of Dr. Meyer Wiener, a nationally known ophthalmologist. Respondent omits qualifying language that completely changes the testimony of Dr. Wiener. For instance, respondent quotes from Dr. Wiener as testifying (Resp. Br., p. 5) that plaintiff "knew

his vision was affected" (R. p. 202). The question and answer follow:

> "Q. Mr. Ettman in this case he knew that? A. I don't know that. He never told me that. He knew his vision was affected, but I don't know whether he knew how it was affected."

Then respondent quotes (Resp. Br. 5) "and probably knew that he might lose his eyesight" (R. p. 206). The actual testimony is as follows (R. 206):

> "Q. Did he show concern and fear that he was going to lose his eyesight? A. I don't know. I could not tell you that. I don't know.
>
> Q. You don't know? A. No, sir, but I know that he would eventually lose his eyesight, but I doubt very much whether he knew it unless somebody else told him.
>
> * * * A. I don't know that he knew anything or had any way to find out the seriousness of his condition, unless some other doctor told him, because I didn't tell him.
>
> Q. Do you recall whether he expressed fear that he might lose his eyesight? A. He probably knew, but I don't recall. If he did we probably reassured him. I could not tell you that.
>
> * * * A. I don't recall his ever expressing it. I don't see that these are contradictory. I still maintain that I doubt very much whether he knew that he realized the seriousness of his condition."

Dr. Wiener further testified (R. 201) that while Ettman's mother knew what his condition was, the doctor did not tell him the truth of his condition, because his mother had requested the doctor not to.

Dr. Alvis, partner of Dr. Meyer Wiener, testified (R. 119):

> "Q. Dr. Alvis, on each of the occasions that Lester Ettman came to your office on the dates you have men-

tioned, was he there for observation and treatment. A. He was; mainly for observation.

Q. And for such treatment as you could give him? A. That is right.

Q. Why would you say it was mainly for observation? A. Because treatment is not indicated in this condition, that is, local eye treatment."

Dr. Alvis testified that he never, to his knowledge, told Ettman of his condition, that his record did not show that he ever told him (R. 136), the record fails to show that any doctor ever told petitioner, and yet respondent has the audacity to speak of misrepresenting to this Court!

Ettman did not visit any oculist between December 10, 1923, and January, 1928 (R. 138, also 241). He did not visit an oculist over fifteen times in twenty-five years (R. p. 242).

The company examined Ettman. It relied upon its examiner's report, not upon any alleged statements made by Ettman. As a matter of fact, Ettman could not have answered "no" under question 4, "Difficult with eyesight or hearing," because the examiner in his medical report wrote to the company that Ettman had moderate myopia, and noted same on his own records, and also wrote "yes" after "ear, eye, etc.," as we have shown in the petition (p. 8) (R. 152). Therefore, there could have been no misrepresentation or misstatement, and the application provides that no statement made by the applicant not included in the application should void the policy or be used in any legal proceeding.

The Missouri Supreme Court has held that a defense cannot be based upon false representations concerning consultations with physicians since the consultation does not contribute to the contingency.

Keller v. Home Life Ins. Co., 198 Mo. 440, l. c. 462, 95 S. W. 903, l. c. 909.

Respondent then argues that during the World War petitioner was examined and rejected because of his eyes. The record shows that Ettman had no access to and never saw his war records; that they were sent direct to Washington (R. 109). It was not the practice to allow draftees to see their records (R. p. 109). Dr. Taussig, in signing his certificate, set out that he was not physically qualified for military service by reason of "weak eyes" (R. 87). Such was the "Finding of the Local Board" (R. 88, 91). When Ettman, the petitioner, was approached by a representative of the company to sign an authorization to examine any of his records, he granted the same (R. 214), and there is no evidence whatsoever in the record to show that petitioner in any way defrauded the company or made any statements with intent to deceive.

The Court will find that the petitioner has not in a single instance misquoted or misstated any fact. The respondent has simply set out its conclusions and not the facts justifying such conclusions. There is no evidence to show that Ettman knew of the character of the eye defect from which he was suffering until he learned about it in 1937, which was about a year after he became blind and nine years after he took out the policy.

Dr. Salter (R. 161) testified that the word "no" that he wrote in the application was an inadvertence. It was so interpreted by Judge Collet in his opinion (R. 292). Besides, Dr. Salter, in the medical examiner's report to the company (R. 79), stated that the only impairment of sight or hearing was "only moderate myopia." He further stated that he was not mailing a confidential report to the company, although the medical examiner's report provides one must be sent in each case (R. 80), and certified that he had carefully examined Ettman in private (R. 80).

Dr. John Green, testifying for the company, testified that if a patient came to him and told him that he had moderate

myopia, he would examine him (R. 107). Myopia would immediately indicate to his mind the possibility of changes taking place later (R. 113). In other words, this would place him upon sufficient notice that there existed an eye defect calling for further examination.

There is no evidence that any doctor told him that he had retinitis pigmentosa or that he would lose his sight, and therefore we repeat there is no evidence in the record that assured knew that he had the disease or that he would lose his eyesight. **There is a big difference between knowing that the eyesight is affected or defective and knowing that one is going to lose his eyesight.** The burden to prove such knowledge was on the company, which knew that one of the specific risks it assumed under the policy was the loss of sight.

The above statement with reference to the correct way that the testimony is set out in the record shows the inaccurate, misleading and reckless statements of the respondent.

As a matter of fact, this Court's decision must necessarily be based upon the statement in the opinion of the Court of Appeals which is set out both in the application for certiorari and in the answering brief of the respondent. The Court of Appeals expressly based its opinion upon the basis of a statement "untrue and material but made without intent to deceive" (R. 308).

REPLY TO RESPONDENT'S POINT I.

Replying briefly to the argument of respondent to petitioner's point I, wherein the respondent contends that, "As there was nothing to put the company on notice, there is no need for further discussion of this point and no necessity for considering the law as declared by the cases cited in petitioner's brief." It is obvious that respondent has missed the point. The Missouri rule is not, as declared in

the opinion of the Court of Appeals (R. 321), to the effect that the fact that the assured wore glasses, was near-sighted and so advised the company's examiner "was no proof that the examiner had knowledge or notice of the existence of retinitis pigmentosa." Under the Missouri law, if the company has sufficient knowledge or information **which, if pursued with reasonable diligence, would have led to the discovery of the condition, this is sufficient.** Otherwise a company could shut its eyes and then say that it had no notice or knowledge of the condition. In the case at bar certainly the company, through its medical examiner, after removing Ettman's glasses and examining his eyes with a light (R. 211), noticing that he wore thick, heavy glasses and having indicated that there was a condition there when the medical examiner put the word "yes" after the question "Eyes, ears, etc.," in the examiner's record (R. 162), was put on inquiry, and, if the company had pursued the matter with reasonable diligence, it would have led to the discovery of the condition which was not known to petitioner. (See cases cited under Point I, Petition for Certiorari, p. 20.) **It is not necessary that an insurance company have actual notice or knowledge under the Missouri law.**

REPLY TO RESPONDENT'S POINT II.

It is next contended by respondent that the Missouri decisions construing the Missouri Misrepresentation Statute do not apply to health and accident policies unless there is a provision for indemnity for loss of life. Respondent also states that the holding in the case of Elliff v. Insurance Co., 153 Kans. 177, 109 Pac. (2) 92, cited by petitioner, does not so hold. The respondent's argument that the Elliff case does not so hold is based upon the fact that the Elliff case cites Becker v. Surety Company, 105 Kans. 99, 181 Pac. 549, for the authority of the Supreme

Court of Kansas that the Misrepresentation Statute applies to health and accident policies. Respondent argues that because there was a death provision in the Becker case that the Elliff case must be based upon that fact. The Elliff case is independent of the Becker case and the Elliff case involved a health and accident policy. The fact that it cites the Becker case proves that the Kansas Court holds that it makes no difference whether there is also a death provision or not. The same rule prevails in Missouri.

Having no answer to the Elliff case, the respondent undertakes to analyze the Becker case, which is cited in the Elliff case, and by a species of legerdemain undertakes to show that the Court in the Elliff case, which was a health and accident policy, must, nevertheless, have had a death benefit in mind because the Becker case had one. We say that it is immaterial whether there is a death provision or not. It is a question of the policy of a state; it is a question of what the Legislature intended to protect against. Is there any reason why the Legislatures of the States of Missouri and Kansas should discriminate against the holders of health and accident policies merely because there is no death provision in them? If they had intended to do so, would they not have said so?

In the interest of brevity, we do not again quote the Misrepresentation Statutes of Missouri and Kansas. They are exactly the same, word for word, except that Missouri has added at the end "and whether it so contributed in any case shall be a question for the jury." We have heretofore pointed out the policy of Missouri and the policy of Kansas is to apply the Misrepresentation Statute to all policies of insurance, whether life, health or accident is involved, as opposed to property insurance. Under the decisions of this Court, where there is a pronouncement of the state law, which ruling has not been disproved, and there is no evidence that the law of the state is otherwise,

it is the duty of the federal court to follow the state rule. [Cases cited under (2) Reasons for Granting the Writ.]

Has the Court of Appeals a right to say that the trial judge and counsel representing both sides are all wrong in following the state policy through the pronouncements of its courts and the general acceptance by the Bar, and that it will declare the law of the state otherwise and contrary to the pronounced policy of the state?

REPLY TO RESPONDENT'S POINT III.

Under point III respondent construes the Misrepresentation Statute to apply to innocent as well as fraudulent misrepresentations; that the statute applies in either event. This was the position taken by the respondent below. The first suggestion of any warranty came from the trial judge (R. 250). The respondent for the first time adopted the notion of a warranty as a defense when petitioner filed a motion for a new trial. The first time that anybody questioned the applicability of the Misrepresentation Statute was in the opinion of the Court of Appeals.

We have already shown that the Misrepresentation Statute applies to warranties as well as misrepresentations. Kern v. Legion of Honor, 167 Mo. 471, 67 S. W. 252.

REPLY TO RESPONDENT'S POINT IV.

There is a difference between dealing with a plain error of law not raised or argued and a theory upon which a case was tried below. The situation in the case at bar is not a case where there is plain error of law not raised or argued. The court below and the parties believed and assumed that the Misrepresentation Statute applied. The case was tried on that theory. The decisions cited by respondent (Resp. Br. 14) are without application. For example:

Hormel v. Helvering, 312 U. S. 552-560, involved questions of law neither present nor passed upon.

In N. Y. Central R. Co. v. Johnson, 279 U. S. 706, there was no exception saved to prejudicial remarks of counsel.

In Brasfield v. U. S., 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345, the Court held it to be reversible error for the trial judge to inquire how a jury stands. Failure to except below did not preclude the Supreme Court from so holding.

In Fairmont Glass Works v. Coal Co., 287 U. S. 474, 480, 53 S. Ct. 252, 77 L. Ed. 439, the Court held that the Court of Appeals could under its rules hold that the trial court erred in refusing to grant a new trial, although not assigned as error, since the motion for a new trial was directed to the failure to award substantial damages. This Court found that every Circuit Court of Appeals except the Eighth has a rule authorizing it to notice a plain error not assigned.

We do not believe such a rule applies to the present situation. The parties tried the case on theory that the Misrepresentation Statute applied. It does apply. The Court of Appeals is the first court to hold that it does not apply. Its opinion contravenes the pronounced policy of Missouri and the applicable decisions construing the statute.

Such cases cannot control the failure of a federal court to apply the recognized substantive law of the state courts.

REPLY TO RESPONDENT'S POINT V.

The same is true of respondent's answer to petitioner's point V. It was not a case of dealing "with a plain error of law not raised or argued." It is a case of failing to follow a substantive rule of state law.

REPLY TO RESPONDENT'S POINT VI.

It is then contended that the Court of Appeals held that "the verdict of the jury was justified by the evidence and the law." What law? The law as declared by the Court of Appeals that there was a warranty, that the Misrepresentation Statute did not apply? If we are correct in our contention that the Court of Appeals is in error in so declaring the law, then the statement would undoubtedly be withdrawn by the Court of Appeals. We say that under the Missouri law, governing the issues of waiver, both in connection with the medical examination; and in connection with the pleadings and legal position taken by the company both in the equity suit and in its answer in the instant suit, under the Misrepresentation Statute, the company presented no defense, was estopped to deny the insurability of petitioner, and there should have been a directed verdict for the plaintiff.

We respectfully pray the Court to grant the petition for writ of certiorari for the reasons therein and herein set out.

Respectfully submitted,

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